



## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[WT Docket No. 19-38; FCC 21-120; FR ID 62114]

### Partitioning, Disaggregation, and Leasing of Spectrum

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission or FCC) proposed an Enhanced Competition Incentive Program to encourage licensees to offer opportunities for small carriers, Tribal Nations, and entities committing to serve rural areas to obtain spectrum via lease, partition, or disaggregation. The *Further Notice of Proposed Rulemaking* seeks comment on the proposed Enhanced Competition Incentive Program, its incentives, and waste, fraud, and abuse protections, as well as additional proposals including alternative construction benchmarks for all wireless radio service licensees and flexibility to reaggregate licenses.

**DATES:** Interested parties may file comments on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and reply comments on or before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by WT Docket No. 19-38, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket

or rulemaking number.

- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington DC 20554
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20-304 (March 19, 2020). <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

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**FOR FURTHER INFORMATION CONTACT:** Katherine Nevitt of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418-0638 or [Katherine.Nevitt@fcc.gov](mailto:Katherine.Nevitt@fcc.gov). For information regarding the Paperwork Reduction Act of 1995 (PRA) information collection requirements contained in this document, contact Cathy Williams, Office of Managing Director, at (202) 418-2918 or [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Further Notice of Proposed Rulemaking* in WT Docket No. 19-38, FCC 21-120 adopted November 18,

2021 and released November 19, 2021. The full text of this document, including all Appendices, is available for inspection and copying during normal business hours in the FCC Reference Center, 45 L Street, NE, Washington, DC 20554, or available for viewing via the Commission's ECFS website by entering the docket number, WT Docket No. 19-38. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to FCC504@fcc.gov or calling the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

### **Ex Parte Rules**

This proceeding shall continue to be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules (47 CFR 1.1200 *et seq.*). Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding,

and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

## **Synopsis**

### **I. INTRODUCTION**

1. With this *Further Notice of Proposed Rulemaking*, we take key steps towards closing the digital divide and we make further progress on the goals set forth by Congress in the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act) regarding the diversity of spectrum access and the provision of service to rural areas. In particular, we propose an Enhanced Competition Incentive Program focused on increasing spectrum access for small carriers and Tribal Nations and on increasing the availability of advanced telecommunications services in rural areas with the goals of promoting greater competition in and expanded access to such services. To achieve these vital Commission goals, we propose to modify our existing partitioning, disaggregation, and leasing rules by providing specific incentives for stakeholders to participate in the program by engaging in qualifying transactions that make spectrum available to these entities and in these areas. Separate from the incentive program, we seek comment on potential alternatives to population-based performance requirements for a variety of stakeholders. Further, we propose to provide for reaggregation of partitioned and disaggregated licenses up to the original license size.

### **II. BACKGROUND**

2. *Partitioning and Disaggregation.* The Commission first adopted rules permitting geographic partitioning, which is the assignment of a geographic portion of a geographic area licensee's license area, and spectrum disaggregation, which is the assignment of portions of blocks of a geographic area licensee's spectrum, for Broadband PCS licenses in 1996. The Commission has since adopted partitioning and disaggregation rules on a service-by-service basis to provide licensees the "flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve."

3. The Commission's partitioning and disaggregation rules apply to all "Covered

Geographic Licenses,” which consist of specified “Wireless Radio Services” (WRS) for which the Commission has auctioned exclusive spectrum rights in defined geographic areas. The license term for a partitioned license area or disaggregated spectrum license is the remainder of the original licensee’s license term. Parties to a geographic partitioning, a spectrum disaggregation, or a combination of both have two options to satisfy service-specific performance requirements (i.e., construction and operation requirements). First, each party may certify that it will individually satisfy any service-specific performance requirements and, upon failure to do so, must individually face any service-specific performance penalties. Alternatively, both parties may agree to share responsibility for compliance with performance requirements, and both parties are subject to any service-specific penalties.

4. *Spectrum Leasing.* In 2003, the Commission adopted the first comprehensive set of rules to allow licensees in the WRS to enter into a variety of spectrum leasing arrangements. In so doing, the Commission recognized the public interest benefits of permitting “additional spectrum users to gain ready access to spectrum,” thus enabling the “provision of new and diverse services and applications to help meet the ever-changing needs of the public.” The Commission’s spectrum leasing rules apply to all “included services,” as set forth in section 1.9005 of the Commission’s rules and which include WRS where commercial or private licensees hold exclusive use rights. A “spectrum leasing arrangement” is an arrangement between a licensed entity and a third-party entity in which the licensee (spectrum lessor) leases certain of its spectrum usage rights in the licensed spectrum to the third-party entity, the spectrum lessee. Commission rules provide for two different types of spectrum leasing arrangements: (1) spectrum manager leasing arrangements, in which the licensee/lessor retains *de facto* control of the licensed spectrum leased to the spectrum lessee; and (2) *de facto* transfer leasing arrangements, in which the lessee is primarily responsible for ensuring that its operations comply with the Communications Act and Commission policies and rules.

5. While the licensee/lessor remains responsible for compliance with any construction and performance requirements applicable to the leased spectrum, the licensee/lessor may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of compliance with any such requirements.

6. *De facto* transfer spectrum leasing arrangements can be either long-term (more than one year) or short-term (one year or less). In general, *de facto* transfer spectrum leasing arrangements are subject to the Commission's general approval procedures, under which the Commission must grant the application prior to the parties putting the proposed spectrum leasing arrangement into effect.

7. ***Statutory Requirement.*** Section 616 of the MOBILE NOW Act required that, within a year of its enactment, the Commission initiate a rulemaking proceeding to assess whether to establish a program, or modify an existing program, under which a licensee that receives a license for exclusive use of spectrum in a specific geographic area under section 301 of the Communications Act of 1934 may partition or disaggregate the license by sale or long-term lease in order to, *inter alia*, make unused spectrum available to an unaffiliated covered small carrier or an unaffiliated carrier to serve a rural area. Congress also provided the Commission the flexibility to proceed if it found that such a program would promote the availability of advanced telecommunications services in rural areas or spectrum availability for covered small carriers.

8. Section 616 required the Commission to consider four questions in conducting an assessment of whether to establish a new program or modify an existing program to achieve the stated goals. First, would “reduced performance requirements with respect to the spectrum obtained through the program . . . facilitate deployment of advanced telecommunications services in areas covered by the program”? Second, “what conditions may be needed on transfers of spectrum under the program to allow covered small carriers that obtain spectrum

under the program to build out the spectrum obtained under the program in a reasonable period of time”? Third, “what incentives may be appropriate to encourage licensees to lease or sell spectrum, including (i) extending the term of a license . . . or (ii) modifying performance requirements of the license relating to the leased or sold spectrum”? And fourth, what is “the administrative feasibility” of those incentives and of “other incentives considered by the Commission that further the goals of [section 616]”? Section 616 provided, however, that the Commission “may offer a licensee incentives or reduced performance requirements under this section only if the Commission finds that doing so would likely result in increased availability of advanced telecommunications services in a rural area.” Additionally, section 616 directs that, “[i]f a party fails to meet any build out requirements set by the Commission for any spectrum sold or leased under this section, the right to the spectrum shall be forfeited to the Commission unless the Commission finds that there is good cause for the failure of the party.”

**A. Notice of Proposed Rulemaking**

9. On March 15, 2019, the Commission released the *Notice* pursuant to the MOBILE NOW Act, which initiated this proceeding to assess whether potential changes to the Commission’s partitioning, disaggregation, and leasing rules might provide spectrum access to covered small carriers or promote the availability of advanced telecommunications services in rural areas. The *Notice* sought comment on the specific questions and considerations posed in the MOBILE NOW Act, but also sought comment on whether the Commission should consider applying any rule revisions to an expanded class of licensees beyond those Congress required it to consider.

10. The Commission received 15 comments and 10 reply comments in response to the *Notice*. Commenters generally supported rule revisions that would increase spectrum access for a variety of entities and increase the availability of advanced telecommunications in rural areas. As discussed below, many commenters also suggested that the Commission go beyond the

MOBILE NOW Act statutory framework if necessary to serve the public interest and to achieve the stated goals.

### **III. DISCUSSION**

11. This *Further Notice* builds upon the efforts initiated in the *Notice* by proposing incentives that are guided by the MOBILE NOW Act framework but expand upon this approach to advance important Commission goals. As discussed in more detail below, we propose an Enhanced Competition Incentive Program (ECIP) focused on increasing spectrum access for small carriers and Tribal Nations and promoting the availability of advanced telecommunications services in rural areas by creating incentives for competition-enhancing transactions. We propose a range of incentives to promote partitioning, disaggregation, and leasing, including extending license terms by five years, extending construction periods by one year, and creating alternate rural-focused construction requirements. Under this two-pronged proposal, parties to qualifying transactions would establish program eligibility by: (1) providing spectrum to small carriers or Tribal Nations; or (2) committing to serve a certain minimum amount of rural area. We also propose measures necessary to ensure program goals are met and that the program is not abused.

12. The ECIP that we propose here would establish specific incentives based on the record in the *Notice*, and would build upon Congress' goals in the MOBILE NOW Act. The ECIP also would further certain long-standing Commission goals by facilitating transactions that promote increased spectrum access for stakeholders that will use this valuable resource efficiently and create meaningful service to rural communities. To develop a more workable solution for a variety of stakeholders, we seek comment on additional proposals on related issues that are consistent with the MOBILE NOW Act, but are based on our pre-existing authority under Title III of the Communications Act of 1934, as amended, pursuant to which the Commission adopted the original partitioning and disaggregation rules. After review of the



record on the *Notice* and as discussed below, we find it in the public interest to explore benefits for Tribal Nations choosing to participate in the ECIP; benefits for an expanded group of stakeholders participating in ECIP through rural-focused transactions; alternative performance requirements for all WRS licenses independent of the specific ECIP benefits; and a spectrum license reaggregation process. The proposals discussed below are intended to facilitate increased spectrum access, rural service, and innovative and next-generation wireless use cases, bringing increased competition to underserved areas, while also easing the administrative burden placed on both licensees and Commission staff.

#### **A. Enhanced Competition Incentive Program**

13. To be eligible for ECIP benefits through a qualifying transaction, we propose that any covered geographic licensee may offer spectrum to an unaffiliated eligible entity through a partition and/or disaggregation, and any WRS licensee eligible to lease in an included service may offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement. As detailed below, we propose two types of ECIP qualifying transactions: those that focus on small carriers and Tribal Nations gaining spectrum access, and those that involve any interested party that commits to operating in, or providing service to, rural areas. We recognize that stakeholders may be eligible for one or both paths. However, to achieve the goals of the program, maintain administrative feasibility as set forth in the MOBILE NOW Act, and reduce the potential for program abuse, we propose that each transaction be filed under either, but not both, prongs. This approach would result in consistent application of program benefits and safeguards to ensure program integrity.

##### **1. Small Carrier or Tribal Nation Transactions**

14. One of the goals of the MOBILE NOW Act was to encourage Commission examination of a program(s) that would promote spectrum availability for small carriers. Through qualifying transactions under this ECIP prong, we would promote small carriers' access

to unused spectrum in any market licensed to a covered geographic licensee. We also find it appropriate to propose a narrow expansion beyond the MOBILE NOW Act statutory framework to increase spectrum access for Tribal Nations.

15. *Eligible Entities.* As indicated in the *Notice*, section 616 of the MOBILE NOW Act defined “Covered small carrier” as a carrier that “(A) has not more than 1,500 employees (as determined under section 121.106 of title 13, Code of Federal Regulations, or any successor thereto); and (B) offers services using the facilities of the carrier.” Further, section 616 applies the definition of “carrier” as set forth in section 3 of the Communications Act of 1934, meaning “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy.” Consistent with Congressional intent, we propose to adopt these statutory definitions for use in the ECIP and to designate covered small carriers as an eligible beneficiary under this prong. We seek comment on whether these are the appropriate definitions for use in the program. In addition, section 616 restricts the partitioning or disaggregation to “unaffiliated” small carriers. Other than looking to the Commission’s designated entity rules, we seek comment on how to determine whether a small carrier is affiliated.

16. We note that most commenters supported an expansion of the covered small carrier definition in the *Notice*, and we seek comment on alternative definitions. While we propose below to adopt more expansive eligibility requirements for rural-focused ECIP transactions, for transactions specifically focused on spectrum access not limited to rural areas, we propose a limited expansion of the group of eligible beneficiaries beyond covered small carriers to include Tribal Nations. This would further facilitate Tribal spectrum access in both rural and non-rural areas as needed. We propose, in the public interest, to include these Tribal Nations and seek comment on this approach. We propose that Tribal Nations eligible under this prong would include any federally-recognized American Indian Tribes and Alaska Native Villages, as well as consortia of federally recognized Tribes and/or Native Villages, or other

entities controlled and majority-owned by such Tribes or consortia. We seek comment on whether this is the appropriate definition of Tribal Nations. As of January 2021, there are 574 federally-recognized Indian Tribes, but we note that there are no federally recognized Tribal Nations in Hawaii. We therefore seek comment on how we should facilitate transactions involving entities seeking to serve native Hawaiian Homelands.

17. *Minimum Spectrum and Geography.* We propose that a qualifying transaction under this prong must include a minimum of 50% of the licensed spectrum for each license(s) that is part of the transaction in a geographic area. This approach is intended to provide stakeholders flexibility in structuring transactions, while: (1) ensuring sufficient spectrum is available for the provision of advanced telecommunications services; and (2) preventing transactions involving *de minimis* spectrum amounts that are entered into solely to obtain ECIP benefits. We seek comment on whether the proposed 50% spectrum threshold makes enough spectrum available to small carriers or Tribal Nations. Should we consider a lower or higher threshold percentage? For licenses that authorize paired frequency bands, should an equal or minimum percentage of the spectrum be from each band? Are there any alternative approaches for ensuring sufficient spectrum is made available to small carriers or Tribal Nations, while requiring a sufficient percentage to preclude abuse of the program?

18. We also propose that a qualifying transaction must include a minimum of 25% of the licensed market area for each license(s) that is part of the transaction, regardless of market size or market type. We seek comment on whether the 25% geographic threshold is the appropriate amount to balance incentives for program participation against concerns of sufficient land area for small carriers or Tribal Nations, and concerns related to preventing program gaming. Are there considerations that would warrant an increase or decrease in the minimum geography required for a qualifying transaction under this prong? For example, should the geographic thresholds be different based upon the varying size of the overall licensed market area (e.g., counties, CMAs, PEAs, BEAs, MTAs, REAGs)? Should parties be able to count

multiple transactions involving partitions of the same license in aggregate to meet the minimum geographic threshold? We seek comment on the costs and benefits of our proposed approach and any suggested alternatives. We also recognize there may be situations where licenses have been previously disaggregated and/or partitioned and a resulting license(s) consists of a small amount of spectrum or small geographic area. Although we propose in this *Further Notice* to prevent licenses that have previously benefited from ECIP from receiving benefits again for the same license(s), we seek comment on whether, from the outset, we should restrict the ECIP to only licenses of a certain minimum spectrum size and geography area. We seek to avoid inclusion in the ECIP of transactions that might potentially evade the purpose of the respective 50% and 25% thresholds.

19. We note that the MOBILE NOW Act directed the Commission to examine potential changes to our partitioning, disaggregation, and leasing framework to offer incentives to meet specific goals. Such a focus would appear to exclude full license assignments, even those to small carriers and/or to rural licensees. We recognize that implementing the ECIP solely for transactions involving partition, disaggregation, or leasing, as Congress directed us to consider, may create a disincentive for stakeholders to engage in otherwise mutually beneficial transactions for full license assignments. Rather, these parties may instead negotiate transactions for smaller areas and/or less spectrum, solely to acquire ECIP benefits even where a full license assignment might be more appropriate given stakeholder needs. We therefore seek comment on whether we should permit full license assignments within the ECIP and, if so, how we should implement these types of transactions. We note that many of the ECIP benefits discussed below are applicable to both parties to a transaction involving partition, disaggregation, or lease of a license, but would only be available to the assignee in a full license assignment scenario, where the assignor is not licensed for that spectrum after consummation of the assignment. If we determine that the public interest would be served by including in the ECIP those transactions involving full license assignments, what safeguards should we put in place to ensure that these

full license assignments achieve the intended benefits of the program?

## **2. Rural-Focused Transactions**

20. We also propose a rural-focused transaction approach that is intended to facilitate coverage to rural areas by tying ECIP benefits to construction and operation obligations, as further detailed below, furthering the Commission's goal of promoting the availability of advanced telecommunications services in rural areas.

21. *Eligible Entities.* In the *Notice*, the Commission sought comment on whether it should consider rule revisions to an expanded class of licensees beyond those Congress required the Commission to consider. The record reflects considerable support for expanding the scope of eligible entities. We agree with commenters that restricting program availability, and therefore program benefits and build-out incentives, to only small carriers, as defined in section 616 of the MOBILE NOW Act, would exclude numerous important spectrum users and provide fewer options for larger carrier licensees that seek to disaggregate, partition, or lease their unused spectrum.

22. Accordingly, we propose to include, by relying on our general Title III powers, any unaffiliated interested party that commits to serve a minimum amount of rural area under the proposed ECIP rural-focused transactions prong, if they meet the proposed requirements. This would expand upon the focus of the MOBILE NOW Act and include a substantial variety of stakeholders seeking to engage in transactions that we anticipate could result in increased spectrum usage and competition in rural areas, such as large or small carriers, common carriers, non-common carriers, Tribal Nations, critical infrastructure, and other entities (large or small) operating private wireless systems in rural areas. This expanded scope could incentivize transactions that accommodate a wide variety of spectrum users in rural areas facing challenges in accessing spectrum and result in more efficient and intensive spectrum use in rural areas. We seek comment on this flexible approach, including whether there is any reason we should restrict

the types of licensees eligible for the ECIP benefits under this rural-focused prong of the program. Similar to our approach in small carrier and Tribal Nation transactions, we also seek comment on whether we should permit full license assignments within the rural-focused prong of the ECIP and, if so, how we should implement these types of transactions. We seek comment on the appropriate definition of affiliated in the context of rural-focused transactions.

23. For purposes of the rural-focused transaction approach and consistent with Congressional intent, we propose to adopt the MOBILE NOW Act definition of “rural area,” which is “any area except (1) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.” We seek comment on this approach and any alternatives that might be more appropriate to achieve ECIP goals.

24. *Minimum Spectrum.* Consistent with our proposed approach to transactions involving covered small carriers and Tribal Nations described above, we also propose in the rural context that a qualifying transaction must designate a minimum of 50% of the licensed spectrum, for each license(s) included in the transaction. We seek comment on whether the 50% spectrum threshold makes enough spectrum available for the actual provision of rural-focused service. Would a lower or higher threshold percentage be more appropriate, particularly considering the increased scope of eligible entities seeking to deploy the spectrum? Are there alternative ways to ensure that there is sufficient spectrum to meet stakeholder needs? Further, is there a need to also specify a minimum threshold in terms of megahertz (in case the license has previously been disaggregated)? For licenses that authorize paired frequency bands, should an equal or minimum percentage of the spectrum be from each band?

25. *Minimum Qualifying Geography.* We propose that a qualifying transaction under this rural-focused prong must include a minimum amount of “Qualifying Geography” sufficient to cover at least 300 contiguous square miles of rural area, for market sizes of Partial Economic

Areas (PEA) or smaller. We seek to incentivize transactions that will result in rural operation/service where most needed. We recognize that these underserved rural areas in many cases may not directly align with the Commission's licensed market areas, and may be near the edge, or even overlap, a market boundary. We therefore propose for this prong a required minimum square mileage of rural area, rather than a percentage of an assignor's market, which could unnecessarily mandate a substantially larger area than intended. The square mileage approach to establish Qualifying Geography provides flexibility for stakeholders to enter a transaction tailored to individual needs, which might involve rural area from more than one license. We propose 300 square miles as the most appropriate figure to ensure that stakeholders include sufficient area in a transaction to warrant the substantial benefits afforded through the ECIP. Where a single transaction involving multiple licenses is needed to obtain the specific rural area sought, we propose to provide ECIP benefits to each license that contains some portion of the 300 square mile area. We seek comment on this approach, including the costs and benefits, and on any suggested alternatives. We understand that rural area could include unpopulated areas, which may otherwise be used for recreation, travel, commercial or business purposes. Should we limit eligibility to areas that have a census defined population? Does our proposed approach provide sufficient flexibility to structure transactions to meet stakeholder needs in rural areas? Conversely, would such a flexible approach result in gaming, for example, the inclusion of license(s) in a transaction solely to receive ECIP benefits that offer a *de minimis* amount of land as a percentage of the 300 square miles of Qualifying Geography? To discourage this potential outcome, should we require a minimum percentage of land within each license involved in a single transaction to meet the Qualifying Geography requirement? Alternatively, should parties be able to count multiple transactions with different parties involving partitions of the same license in aggregate to meet the Qualifying Geography threshold?

26. We also find it appropriate, given the Commission's current market sizes and goal of incentivizing meaningful service and operation in rural areas, to propose a minimum

geography of 300 square miles of rural area for PEA markets and smaller markets. However, given the wide range in size of available markets subject to geographic area licensing, we seek comment on whether it would be appropriate to scale the amount of Qualifying Geography on a proportional basis in two ways. First, we recognize that there are variations in market sizes even for PEAs and smaller markets. For example, in approximately 3% of PEA markets (located in large Western states, including some in Alaska), 300 square miles represents less than 1% of the market land area. We seek comment on whether we should proportionally scale the minimum required Qualifying Geography upwards in these PEA markets to account for their larger size. Second, we seek comment on whether we should proportionally scale the minimum required Qualifying Geography upwards for all markets larger than PEAs. We note that the next largest market area size in relation to PEAs are Basic Economic Areas (BEA), where the average land area is almost twice the size of the average PEA. For Regional Economic Area Grouping (REAG) market areas, which can be comprised of several states, the market size on average is approximately 45 times larger than the average PEA. Would scaling in the large PEA context and/or for markets larger than PEAs prevent windfall benefits for transactions yielding nominal spectrum access and minimal rural buildout relative to the geographic size of the license receiving ECIP benefits? We seek comment on what the costs and benefits are with respect to any such proportional scaling and any suggested alternatives.

27. In addition, we seek comment on whether we should consider coverage on Tribal lands as an alternative to coverage of rural areas. We understand many Tribal lands are located in rural areas and to that extent might already qualify for ECIP benefits under this rural prong, but note that such lands may not be located in all instances in a contiguous 300 square mile area, or might be at least partially located in suburban or urban areas. Should we deem non-contiguous blocks of Tribal land that collectively reach the Qualifying Geography threshold sufficient to warrant ECIP benefits? In addition, we seek comment on the appropriate definition of Tribal lands for purposes of the ECIP.



## **B. Enhanced Competition Incentive Program Benefits**

28. To properly incentivize licensees to make spectrum available to small carriers or Tribal Nations, and to engage in other rural-focused transactions, we propose three specific benefits for ECIP participation. Specifically, we propose to: extend license terms for all parties to a qualifying transaction by five years; extend construction deadlines (both interim and final) by one year for all parties to a qualifying partition/disaggregation transaction and for lessors in a qualifying spectrum lease arrangement; and establish an alternate rural-focused construction requirement for certain transactions. We seek comment on these proposals, any alternative approaches, and associated issues, including whether there are appropriate incentives to encourage licensee participation in the program earlier in the term of the license.

### **1. License Term Extensions**

29. The *Notice* sought comment on the appropriate incentives to achieve the MOBILE NOW Act's goal of encouraging licensees to partition, disaggregate or lease spectrum, including the incentive of license term extensions. Most commenters addressing the issue of incentives generally supported an extended license term benefit, with one commentor cautioning against conferring outsized benefits. We find it appropriate to propose a five-year license term extension for all parties involved in a qualifying partition/disaggregation transaction, and for all lessors entering into a qualifying spectrum leasing transaction, given that the lessor retains the renewal obligations. We believe this proposal will reduce regulatory burdens with less frequent renewal obligations and will properly incentivize secondary market transactions, particularly spectrum leases that are subject to the lessor's license term. We also propose recommended controls to avoid waste, fraud, and abuse as detailed below.

### **2. Construction Extensions**

30. The *Notice* also sought comment on whether modifications to the Commission's performance requirements, including a one-year extension in certain circumstances, would be

likely to increase service to rural areas. Commenters expressed significant support for the temporal benefit of additional time to construct facilities, with some arguing that the difficulty and expense associated with building rural areas justifies the benefit. In addition, one commenter acknowledges the potential timing constraints for meeting construction requirements when spectrum is received in the middle of a license term. After review of the record, we propose that all parties to a qualifying transaction receive a one-year construction extension for both the interim and final construction benchmarks where applicable. We believe this approach strikes the right balance between incentivizing small carrier, Tribal Nation, and rural-focused transactions, while ensuring that assignees have adequate time to meet their construction milestones. We propose that this benefit would apply to both parties in a qualifying transaction involving partition or disaggregation. We also propose that this benefit would apply to the lessor in a qualifying spectrum lease arrangement, given that the lessor retains the obligations to comply with buildout and renewal requirements. We seek comment on these proposals and any associated costs and benefits. We recognize that the *Notice* sought comment on whether the Commission should limit any construction extension benefits to transactions filed no later than six months prior to the construction deadline. After review of the record, and in the interest of promoting even late-term transactions that will ensure increased spectrum access and actual spectrum usage in rural areas, we propose not to establish a timeframe prior to a construction deadline within which an ECIP qualifying transaction must be filed. We seek comment on whether this flexible approach will incentivize parties to enter qualifying transactions, or whether an ECIP transaction filing cut-off date prior to relevant construction deadlines is necessary to prevent unintended results.

### **3. Alternate Construction Benchmark for Rural-Focused Transactions**

31. In response to the *Notice*, nearly all commentors supported modified performance requirements, noting that existing licenses that include significant portions of rural area are typically for large market areas, often leaving rural and remote areas underserved. Many

commenters stated that modification of performance requirements would appropriately reflect the realities of deploying spectrum in rural, underserved, and unserved areas, and would incentivize the efficient allocation of spectrum.

32. To facilitate rural-focused transactions that achieve rural buildout, we propose to substitute an assignee's existing performance requirement with an alternative construction benchmark for those licenses acquired in an ECIP transaction qualifying under the rural-focused transaction approach described above. Specifically, the alternate construction benchmark would require 100% coverage of the Qualifying Geography (coverage to at least 300 contiguous square miles of rural area, for market sizes of PEA or smaller) that was the basis for the qualifying transaction, as well as the provision of service to the public, or operation addressing private internal business needs over that area. We clarify that our proposal for an alternate benchmark does not modify the timeframe for meeting the benchmark, which would remain the current deadline of the partitioned/disaggregated license, plus the one-year extension proposed in the above construction extension benefit section. As previously discussed, the proposed minimum geography seeks to ensure a reasonable investment in construction of facilities in rural areas to warrant the substantial ECIP benefits, while furthering the Commission's long-held goal of providing licensees with flexibility to determine the amount of spectrum licensees will occupy and the geographic area they will serve, and permitting stakeholders to build networks suited to the particular community needs. We seek comment on this approach, including the proposed benchmark, and the associated costs and benefits. Does this approach adequately ensure that an assignor does not enter into partitioning transactions solely for the purpose of reducing the area or population required to be covered under its service-specific performance requirements? In cases where the assignee ultimately fails to construct, should we require the assignor in a partition to meet its obligations consistent with the entire license area, by including in the relevant denominator the population/land of the partitioned-off area? Finally, we also seek comment on whether we should consider an alternative approach specifically tailored to the

needs of Tribal Nations. What should the appropriate benchmarks include and what additional factors should be considered to facilitate the provision of service to Tribal Nations?

33. For assignees involved in partitioning and/or disaggregation where the interim performance requirement has not been met, we propose that this alternative construction benchmark would replace the existing interim performance requirement, and remove the final performance requirement, contained in the service rules for the particular license acquired in the ECIP transaction. Where the assignor has previously met the interim construction deadline, this alternative construction benchmark would replace the final construction obligation for the assignee. We propose that the assignor remain bound by the existing substantive coverage requirements for its license(s) (extended by one-year) involved in a qualifying ECIP transaction. We note, however, that this approach provides an additional incentive to the assignor that arguably will meet its performance requirements more easily following a partitioning/disaggregation transaction that reduces the geographic area/population it must cover. We seek comment on this approach, as well as the associated costs and benefits.

34. While our alternate construction benchmark proposal under ECIP focuses on parties individually satisfying performance requirements, the Commission's rules currently permit parties in a partition or disaggregation transaction to share responsibility for any service-specific requirements, and therefore share the penalties associated with failure to meet those performance requirements. We seek comment on whether the construct of a shared buildout requirement runs counter to the ECIP framework proposed herein and, if so, whether, we should afford this particular ECIP benefit solely to those parties that opt to separately meet their construction obligations. Do the ECIP benefits, as well as waste, fraud, and abuse protections, negate the need for the protections that shared responsibility provides? In the context of rural-focused transactions, does a shared responsibility unfairly burden one party over the other?

35. We do not propose an alternate construction benchmark for spectrum lease

arrangements. For spectrum lease arrangements that qualify under ECIP, consistent with existing rules, we propose that a lessor would be able to attribute the construction and operation of its lessee's Qualifying Geography to its underlying performance obligations on its license. We believe that retaining this current pass-through benefit is sufficient (given the additional ECIP benefits conferred) to incentivize lessors to lease unused spectrum, particularly in uncovered rural areas. However, consistent with our approach to an assignor in the partition and/or disaggregation context, the lessor is nonetheless bound by the existing performance requirements set forth in the applicable service-specific rules. We seek comment on these tentative conclusions.

### **C. Enhanced Competition Incentive Program Waste, Fraud, and Abuse Protections**

36. Given the substantial benefits being proposed for ECIP participants, and to ensure that stakeholders enter into transactions that will further our goals of increased spectrum access, rural service, and competition, we propose certain measures to protect against waste, fraud, and abuse of the program. We note that applicant character qualifications are part of our review of whether a transaction can be approved in the public interest, and we seek comment on the specific measures proposed below. We invite commenters to suggest alternative or additional measures that would ensure that the benefits we propose for ECIP participants are targeted and appropriate. For example, most of the measures we propose focus on assignees or lessees participating in ECIP transactions, but we welcome suggestions on whether additional restrictions should be imposed on ECIP participant assignors and lessors.

37. As stated above, we recognize that parties to an ECIP transaction are likely in many instances to meet the eligibility requirements for both the small carrier/Tribal Nation transaction prong and the rural-focused transaction prong (e.g., a covered small carrier might be interested in obtaining spectrum access to serve an area consisting of at least 300 rural square

miles). Nonetheless, we recognize that open-ended program flexibility might have significant drawbacks. We therefore propose distinct paths to ECIP participation to meet the program's policy goals, to make program administration more feasible, and to afford targeted benefits while reducing instances of program abuse. We clarify our proposal that for each ECIP transaction, applicants must elect either prong 1 or prong 2, not both, and they may not, subsequent to application grant, modify the selected path. As a specific example, under our ECIP proposal, an assignee in a rural-focused transaction proposing to provide service to a partitioned area of at least 300 rural square miles under prong 2 is required to provide service or operate over that entire area by the extended construction deadline. Although that assignee may also be a covered small carrier by definition under prong 1, to ensure provision of the rural service to the Qualifying Geography for which ECIP benefits were granted, we do not propose to permit that assignee to later elect to provide service, in the alternative, to a percentage of population within its licensed area that might include more urban populations, as it might have had it elected to file its ECIP transaction under prong 1. We seek comment on this approach and potential costs and benefits.

38. *Holding Period.* First, we propose to impose a five-year holding period on licenses assigned through partitioning and/or disaggregation as part of ECIP transactions. Specifically, assignees of licenses obtained through ECIP transactions may further assign or lease, in whole or in part, those licenses to other entities only after the expiration of a five-year period commencing from the date of license issuance, and provided the assignee has met both the construction requirement and the three-year operational requirement proposed below (which also satisfies its interim performance benchmark). We seek comment on whether an alternative length of time is more appropriate for this holding period, considering the ECIP benefits conferred.

39. We also propose to apply a parallel "holding period" safeguard in the leasing context. Specifically, for spectrum leases subject to receiving ECIP benefits, we propose to

require a mandatory five-year minimum lease term. We believe that this approach fosters transaction parity by not improperly incentivizing leases over other potential transactions. We seek comment on this proposal and the costs and benefits associated with this approach. In particular, we seek comment on how we should address leases terminated after less than five years. We recognize that the realities of the market often result in early termination of such agreements, but also that the benefits we propose for ECIP transactions could pose a significant risk of program abuse through leasing. Under what circumstances, if any, should such an early termination result in the lessor losing the benefits already applied to its license? Should such benefits be prorated based on how prematurely the lease was terminated? For example, if a lease is terminated after only two years, we could reduce by three years the lessor's license term, but maintain the performance requirement extension. What are the advantages and disadvantages of such an approach? Are there alternative methods of preventing sham leasing? On a related note, we seek comment on whether we should prohibit subleases or otherwise limit subleases to prevent program abuses.

40. To facilitate routine transfers, we propose to allow a *pro forma* transfer exception (such as pursuant to corporate reorganizations). We seek comment on whether we should allow further exceptions to the holding period restriction. For example, are there additional types of transactions, other than *pro forma* transfers, which should be permitted? Should we allow assignees or lessees under the ECIP to assign their licenses or leases to other ECIP-eligible parties that agree to be bound by the ECIP requirements? Are there any additional requirements or protections we should impose on such transactions? Commenters should discuss the costs and benefits of our proposed approach and any alternatives.

41. *Operational Requirement.* To ensure that spectrum is efficiently used in underserved rural areas, we propose an operational requirement on certain ECIP transactions. Specifically, we propose that the assignee or lessee of any transaction that qualifies as an ECIP rural-focused transaction would be required, for a minimum of three consecutive years, to either

(1) provide and continue to provide service to the public; or (2) operate and continue to operate to address the licensee's private, internal communications needs. We propose that the level of service during this three-year operational period must not fall below that used (or intended to be used) to meet its construction requirement (for assignees) and ECIP eligibility (for lessees). This approach provides a uniform measure of operational status and verifiable service for a sustained period. We seek comment on this proposal, including the associated costs and benefits.

42. For assignees acquiring an ECIP license through partition and/or disaggregation, we propose that this operational period begin the earlier of the date of actual construction or the date of the interim construction deadline for that license, as modified by the ECIP. We propose that ECIP lessees must operate or provide service for three consecutive years during any period within the five-year minimum lease term. We seek comment on this proposal and any alternative structures for operational requirements, including the associated costs and benefits. Specifically, we seek comment on the interplay of this requirement with our concerns discussed above regarding early termination of leases. We also note that there is no current Commission requirement for lessees to independently certify construction of leased spectrum, as the lessor is responsible for meeting performance requirements and may include in its showing, at its option, any construction by its lessee. Considering the construction and operational requirements proposed in the ECIP, should we also impose a construction notification requirement on lessees that would allow us to verify that lessees have complied with ECIP construction and operational requirements, thereby increasing program accountability?

43. *Automatic Termination.* We also propose, consistent with the MOBILE NOW Act, automatic termination for any licenses assigned as part of an ECIP transaction where the licensee fails to meet the program requirements or construction requirements. Further, we propose that any licensee which was subject to such termination, or any lessee which fails to meet the program requirements, or affiliate of such an entity, would not be eligible to participate in the ECIP in the future. We seek comment on the appropriate definition of affiliate. We seek



comment on our proposal, including the costs and benefits. We also seek comment on what measures could be implemented to prevent instances of program abuse, particularly with respect to lessors and assignors participating in the program. How should we address instances where we believe the assignor or lessor is potentially abusing the ECIP to obtain the program's benefits through assignments or leases to entities it knows or should know cannot satisfy the program's obligations?

44. For example, should we extend program ineligibility and/or automatic license termination penalties to the assignor or lessor and its affiliates in situations where its assignee(s) or lessee(s) does not meet program requirements, including construction and operation obligations for which both parties to an ECIP transaction received benefits? Should we condition assignor/lessor program benefits on assignee/lessee performance of construction and continuity of service obligations, particularly in the rural-focused transactions context, to ensure that benefits do not accrue without provision of service or operation in these potentially underserved areas? For example, one approach is to not apply the five-year license term extension to an assignor's license where its assignee/lessee fails to timely construct or operate in the identified Qualifying Geography. We seek comment on the costs and benefits of such an approach. We also seek comment on whether, in the rural-focused transactions context to ensure service or operation, we should condition the assignor/lessor's one-year construction extension on an assignee/lessee's timely compliance with its construction deadline(s). We note that an assignor/lessor and assignee/lessee may have the same extended interim or final construction deadline under the ECIP, and therefore the Commission may not be aware of an assignee/lessee's failure to timely construct until after the expiration of the assignor/lessor's construction deadline, which the assignor/lessor may have relied upon in the construction of its license. How should we address this situation to strike the appropriate balance between properly incentivizing transactions and attempting to eliminate instances of program abuse?

45. *Limitations on Additional Benefits for Subsequent Transactions.* To prevent the

benefits of the ECIP from undermining our renewal and construction policies through compounding extensions, we propose that once a license is the subject of a qualifying transaction and has received the benefits associated with the ECIP, that license, and any license created from it, will be ineligible to receive additional ECIP benefits. We propose to apply this restriction to the original license, as well as to licenses issued pursuant to a partition or disaggregation. In other words, if the license at issue in a given transaction has previously been involved in an ECIP transaction, it is not eligible for any more ECIP benefits. We believe this will prevent abuse resulting from leveraging the same spectrum or geography to gain repeated license term or construction extensions. We seek comment, in the alternative, on whether a licensee should instead be eligible for ECIP benefits once per license term.

46. We recognize that this proposal does not provide incentives for licensees to enter into subsequent assignments or leases of their unused spectrum rights, and that there may be situations where such subsequent transactions can provide public interest benefits without undermining our proposed program policies. For example, Licensee A may wish to partition an area to Licensee B (receiving benefits under the ECIP) and also partition another area to Licensee C; are there circumstances in which Licensee C should receive ECIP benefits beyond those already afforded to the license to be partitioned? We seek comment on whether we should permit these types of subsequent transactions, what benefits are appropriate, and how we might ensure that our renewal and construction policies are not frustrated through multiple transactions.

47. *Restrictions on Leasing and Subleasing of Spectrum Rights Obtained Through the ECIP.* Finally, we seek comment on how to approach leasing and subleasing of spectrum rights obtained through ECIP transactions. We recognize that subsequent leases by ECIP assignees and lessees could be used to circumvent our eligibility rules and holding period protections. For example, an assignee of an ECIP transaction could lease its spectrum rights to a third party, including the assignor in the ECIP transaction, extending the license term and construction deadlines, but not resulting in the public interest benefits intended by the ECIP. However,

leasing is also an important tool in facilitating spectrum being put to use. How should we prevent this kind of abuse while still permitting leasing where it is in the public interest? Should we only permit leases (and subleases) of such rights to other ECIP-eligible entities? What are the costs and benefits of this approach or alternatives?

48. *Report.* The ECIP seeks to promote competition and increased spectrum access for small carriers and Tribal Nations and to increase the availability of advanced telecommunications services in rural areas. These are critical Commission goals, and we have proposed substantial incentives to encourage participation by our licensees. Because of the importance of these goals and the nature of these incentives, we propose to direct the Wireless Telecommunications Bureau (Bureau) to conduct a review of the ECIP, with an opportunity for interested stakeholders to provide input, so that we may assess the program's effectiveness. We propose that, after an appropriate period of time not to exceed five years from the effective date of the final order adopting the program, the Bureau would submit a public report on the ECIP to the Commission. We propose that the report would include data about ECIP participation by eligible stakeholders, including the number of secondary market transactions, as well as the geographic areas and spectrum made available, under each prong of the program. We further propose that the report would include recommendations about rule or policy changes to increase the effectiveness of the program. In addition, we propose that the report would be publicly available, and that the Bureau could also prepare a non-public version with commercially sensitive information, if included. We seek comment on our proposals. We also seek comment on any other information that stakeholders advocate for inclusion in this report.

#### **D. Alternative to Population-Based Construction Requirements**

49. The *Notice* sought comment on a range of issues related to facilitating increased spectrum access and increased availability of telecommunications service in rural areas. As discussed above, commenters generally were supportive of Commission action to incentivize

transactions to meet these key goals, including the MOBILE NOW Act's focus on possible benefits of modified construction requirements. In addition, commenters expressed additional concerns that our current performance rules across virtually all WRS are based on providing coverage and offering service to a percentage of the population in the licensed geographic area, which typically results in more urban-focused service and a lack of service to rural areas. Commenters urge the Commission to provide an alternative to population-based performance benchmarks that will better meet the business needs of a variety of stakeholders, including those providing service to rural subscribers, or that operate telecommunications systems in conjunction with businesses located in less populated rural areas. As WISPA explains, "standards based on population coverage encourage licensees to satisfy the requirement for a large-footprint license by covering only the most populated areas," often to the exclusion of less populated areas like rural America. This approach to build-out requirements can incentivize licensees to focus their deployment efforts on densely populated areas to quickly satisfy their construction requirements, which can leave rural Americans underserved or unserved entirely and can result in a "surplus of unused spectrum, usually in less densely populated areas." Further, commenters argue that having pre-approved construction requirements offers a greater level of certainty for licensees, which would reduce concerns about the risks involved in leasing and/or partitioning arrangements in particular.

50. We recognize that providing alternatives to construction requirements to a wide range of stakeholders can incentivize acquisition of licenses by entities that will deploy innovative spectrum use models and reach underserved areas. We believe that such an alternative option also can serve the public interest by providing all licensees more certainty as to regulatory requirements when planning to deploy networks, even for licensees acquiring spectrum directly from the Commission. We therefore seek comment on providing all WRS flexible use licensees an alternative construction requirement to population-based construction requirements, including for licenses acquired through a transaction (qualifying for ECIP benefits

or not) or licenses newly issued to an auction winner. We seek to develop a robust record on the most beneficial alternatives to achieve more efficient use of spectrum, particularly in underserved rural areas.

51. As noted, the Commission has adopted population-based performance requirements in most flexible use radio services. In so doing, the Commission largely departed from providing the “substantial service” option that was available to many licensees in certain services. This option allowed licensees to provide an alternate demonstration as to how its spectrum was used in the public interest where population benchmarks either could not be met or were an inaccurate measure of actual spectrum usage. We therefore seek comment on whether to provide a “substantial service” type alternative as has previously been used in many different services. We recognize that use of the subjective term “substantial” provides flexibility to licensees, but it can also create uncertainty over how to meet the standard and how to enforce the standard. We therefore seek comment on the appropriate definition of substantial service or an appropriate variation of this concept more tailored to individual licensee needs.

52. We seek detailed comment on how we can best accommodate particular use cases that are less suited to meeting population coverage requirements, for example, critical infrastructure, Internet of Things applications, and other private internal uses (e.g., oil and gas, agricultural, industrial, railroads). How should we tailor performance requirements to these types of spectrum uses that do not directly serve the public through ubiquitous mobile service to subscribers in a manner that nonetheless facilitates enforcement of buildout obligations in the public interest? Should we establish specific safe harbors to provide more certainty to stakeholders, as some commenters in this record suggest? What is an appropriate safe harbor for these types of use cases? Should we only apply (or modify) a safe harbor in rural areas, recognizing that the Commission adopted a rural safe harbor for certain radio services in 2004? Would establishing band-specific alternative metrics or safe harbors aid in incentivizing partitioning, disaggregation, or leasing with a range of diverse use cases and in particular, rural

providers? How should we accommodate licensees seeking either to provide services or to meet internal connectivity needs through fixed, rather than mobile, operations? Commenters addressing these issues should provide specific examples and also address the costs and benefits of any recommended approach.

53. If the Commission determined that the public interest would not be served by adopting the substantial service concept on a more widespread basis, we also seek comment on whether there are more suitable alternative metrics for flexible use licenses in lieu of population coverage. What are the appropriate alternative performance benchmarks for these types of spectrum use cases, whether fixed or mobile or both? Should we apply a specific geographic area coverage benchmark to these market areas? How could performance requirements be tailored to meet stakeholder business needs, while ensuring that business decisions do not result in spectrum lying fallow in potentially large areas of a market?

#### **E. Reaggregation of Spectrum Licenses**

54. Under our current rules, while licensees may partition and disaggregate their licenses through spectrum transactions, there is no provision for reaggregating spectrum, even when the partitioned or disaggregated portions of an original market area are acquired by a single entity. In the *Notice*, the Commission sought comment on whether to permit flexible use licensees to reaggregate licenses that have been partitioned and/or disaggregated up to a maximum of the original market/channel block size, provided certain regulatory requirements have been fulfilled. The Commission asked whether such an approach would increase the incentives of parties to lease or sell spectrum, thereby furthering the Congressional and Commission policy goals of increased spectrum access for small carriers and increased rural service. Many commenters acknowledge the public interest benefits of permitting partitioning/disaggregation, but also note that business circumstances may subsequently necessitate license reaggregation, which they argue should therefore be permitted by rule with a

clear licensing path for doing so. For example, R Street suggests that “[a]llowing reaggregation is essential to well-functioning markets,” and that “[p]ermitting free reaggregation alongside disaggregation would not only allow more flexibility in the use of spectrum over time, it would also incentivize initial licensees to participate in the secondary market in the first place.” CTIA and Google also support this flexible approach. Google agrees that the reaggregation cap should be the original size of the market area, while RS Access suggests that “the Commission’s rules should not restrict aggregation to instances where the licensee is merely reaggregating previously disaggregated or partitioned spectrum . . . the rules should permit the aggregation of licenses that were not previously disaggregated or partitioned, provided a licensee has satisfied the substantial service requirements for each of the licenses.”

55. Some commenters, however, oppose a reaggregation process on the grounds that it would create the “potential for abuse by large carriers” because it would “encourage...licensees to use partitioning to avoid their buildout obligations by partitioning non-desirable or hard-to-serve spectrum” followed by a later reaggregation and consequent spectrum warehousing. Similarly, GeoLink and WISPA argue that allowing reaggregation would undermine the goal of increasing spectrum access by small and rural carriers.

56. The *Notice* sought comment on the costs and benefits of permitting reaggregation, as well as whether measures were necessary to prevent abuse, particularly evasion of any performance requirements associated with partitioned or disaggregated licenses subject to a request for reaggregation. Stakeholders largely agree that there were substantial administrative benefits associated with permitting reaggregation, including those related to construction requirements, renewal showings, continuous service requirements, and the need to maintain up-to-date information in the Commission’s Universal Licensing System. Commenters also discuss the added costs associated with maintaining multiple licenses that were formerly a single license and the extent to which this could discourage disaggregation in the first place. R Street does not favor construction requirements, but comments that “[i]f the Commission is committed to

keeping construction requirements, it could avoid this difficulty by allowing reaggregation only after the original construction requirements for the aggregate license area have been met.” Google suggests that, “[t]o the extent that possible manipulation of disaggregation and reaggregation to evade regulatory construction deadlines is a concern, the Commission could condition reaggregation on building out the entire reaggregated service area.”

57. After review of the record, we propose to permit license reaggregation with appropriate safeguards. Our goal is to further the public interest by providing a path to removing unnecessary regulatory barriers to facilitate secondary market transactions and easing administrative burdens for stakeholders and the Commission. Permitting reaggregation can make our licensing information easier to use through a more flexible, yet accountable, data policy for geographic spectrum licenses. The reaggregation proposal described below, however, is not intended as an overall reexamination of the Commission’s adopted approaches on key licensing issues related to WRS licenses, including performance requirements, renewal and associated continuing service obligations, and permanent discontinuance of operations.

58. Accordingly, we propose to permit licensees to seek reaggregation of partitioned and/or disaggregated portions of licenses up to the original geographic size and spectrum band(s) for the type of license. We believe that this approach is the appropriate scope for reaggregation requests and that expanding this proposal to permit consolidation of market licenses not previously partitioned or disaggregated, as one commenter suggests, would unnecessarily undermine the established WRS licensing framework and complicate our attempt to ease administrative burdens. As a safeguard against potential abuses, we propose to require that, prior to seeking license reaggregation, the entity requesting reaggregation must ensure that each license to be reaggregated has: (1) met all performance requirements (both interim and final benchmarks); (2) been renewed at least once after meeting any relevant continuing service or operational requirements, if applicable; and (3) not violated the Commission’s permanent discontinuance rules. We seek comment on our proposed approach to preventing potential



abuses of our essential licensing requirements, including whether we should consider further safeguards such as requiring any additional certifications from applicants seeking license reaggregation.

59. To implement our proposed reaggregation approach, we propose that a licensee holding multiple active licenses in the same radio service and for the same channel block may seek reaggregation by: filing FCC Form 601, identifying the licenses to be reaggregated, and certifying that the performance requirements, renewal requirement, and lack of permanent discontinuance conditions have been met. Under this proposal, the licenses must be active and held under the same FCC registration number (FRN). To simplify the administrative process associated with this effort, we propose to treat this as a separate filing from any transactions that may be necessary to transfer the licenses under the same FRN and to prohibit combining a proposed reaggregation with any other transaction in the same FCC 601 application. We recognize that the subdivided licenses within a partitioned/disaggregated market may, over the course of license term(s), be the subject of additional license conditions, rights (such as granted waivers), and other parameters that make them dissimilar. We seek comment on this approach and on how best to reflect those unique parameters on the reaggregated license. For example, if one of the licenses (but not the others) authorizes operation at higher power levels through a granted waiver, should the waiver rights and conditions be transferred to the reaggregated license (but only for the geographic area and spectrum associated with the license subject to waiver)? Alternatively, to simplify the process, should we prevent reaggregation in cases where the licenses do not have identical rights and conditions? We seek comment on how we should address these types of circumstances, as well as the costs and benefits of any suggested alternatives.

#### **F. Other Considerations**

60. *Open Radio Access Networks.* Over the last several years, the Commission has

worked closely with federal partners, equipment manufacturers, carriers, and other parties on the important issue of securing the United States' communications networks, in particular in the area of supply chain risk management. In March, 2021, the Commission issued a *Notice of Inquiry* into one potential method of promoting secure communications networks: Open Radio Access Networks (Open RAN). Open RAN has the potential to allow carriers to promote the security of their networks while driving innovation, in particular in next-generation technologies like 5G, lowering costs, increasing vendor diversity, and enabling more flexible network architecture. Comments received in response to that *Notice of Inquiry*, as well as discussions enabled by the Commission's Open RAN Solutions Showcase, held on July 14-15, 2021, show that these technologies have great promise.

61. To that end, we seek comment on whether and how we should factor the use of Open RAN technologies into the ECIP. For example, should we tie ECIP benefits to the use of Open RAN in network deployment? If so, what level of use should we require, and how would parties demonstrate their use in their application? Should this requirement apply to assignors and lessors, and assignees and lessees, or only to some parties? Alternatively, how could we further incentivize ECIP participants to explore Open RAN deployments? Should we retain our proposed ECIP eligibility requirements, and provide additional benefits to parties which use Open RAN in their networks? If so, what should those additional benefits be? Should we make these benefits available to both assignors/lessors and assignees/lessees, if both sides of the transaction demonstrate their use of these technologies?

62. *Use or Share Spectrum Access Models.* Many commenters proposed adoption of varying spectrum rights models with the "use or share" model emerging prominently in the record. This spectrum rights model typically involves enabling temporary or opportunistic shared access to unused portions of a licensed band in which a licensee has not begun operations.

63. The Open Technology Institute at New America and Public Knowledge's joint

comment references various implementations of the use or share model, in particular noting how this model is employed at 3.5 GHz (via Spectrum Access Systems) and 600 MHz (via white spaces databases). We seek comment on “use or share” models generally, and in particular on whether there are voluntary mechanisms or incentives that we could put into place to promote sharing, whether as part of the ECIP or more widely. We seek comment on whether such an approach could increase spectrum access and/or promote competition, and how these mechanisms could be implemented. We also seek comment on incentives to promote sharing by licensees with opportunistic users on a secondary basis. We recognize that dynamic sharing has been managed effectively through spectrum access systems and databases in some bands, and we seek comment on the suitability for these systems to facilitate sharing in other bands. We seek comment also on whether there are particular scenarios in which licensees and sharing proponents might self-coordinate without an access system or database, how that would function, and how we might encourage such arrangements. We seek comment on the costs and benefits of such approaches to sharing.

64. *Digital Equity and Inclusion.* Finally, the Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission’s relevant legal authority.

#### **IV. PROCEDURAL MATTERS**

65. *Paperwork Reduction Act Analysis.* This *Further Notice of Proposed Rulemaking* may contain new or modified information collection(s) subject to the Paperwork Reduction Act

of 1995. If the Commission adopts any new or modified information collection requirements, they will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

66. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning potential rule and policy changes contained in this *Further Notice of Proposed Rulemaking*. The IRFA is contained in Appendix B to the *Further Notice of Proposed Rulemaking*.

## **V. ORDERING CLAUSES**

67. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 303, and 310(d) of the Communications Act of 1934, as amended, and section 616 of the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act, 47 U.S.C. 151, 154(i), 303, 310(d), 1506, that this *Further Notice of Proposed Rulemaking* is HEREBY ADOPTED.

68. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission’s Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the *Further Notice of Proposed Rulemaking* on or before 60 days after publication in the Federal Register, and reply comments on or before 90 days after publication in the Federal Register.

69. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 1**

Practice and procedure, Wireless radio services Applications and proceedings, Spectrum leasing.

FEDERAL COMMUNICATIONS COMMISSION.

**Marlene Dortch,**

*Secretary.*

## Proposed Rules

The Federal Communications Commission proposes to amend 47 CFR part 1 as follows:

### PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. ch. 2, 5, 9, 13; 28 U.S.C. 2461, unless otherwise noted.

2. Amend § 1.950 by revising the heading of paragraph (c) and adding paragraph (i) to read as follows:

#### § 1.950 Geographic partitioning and spectrum disaggregation.

\* \* \* \* \*

(c) *Filing requirements for partitioning and disaggregation.* \* \* \*

\* \* \* \* \*

(i) *Reaggregation of licenses.* (1) A licensee of multiple licenses which were disaggregated or partitioned, pursuant to § 1.950, from the same Wireless Radio Service License may apply to reaggregate those licenses into one new license.

(i) Parties may not reaggregate licenses unless all licenses to be aggregated were once part of the same Wireless Radio Service license.

(ii) All performance requirements for the licenses to be combined through reaggregation must have been completed and certified as required prior to the filing of the application.

(iii) Each of the licenses to be combined through reaggregation must have been renewed at least once since the completion and certification of all performance requirements.

(iv) None of the licenses being combined may have violated the Commission's permanent discontinuance rules, as applicable to that license.

(2) A licensee does not need to reaggregate all licenses which were once part of the

original Wireless Radio Service license in order to qualify for reaggregation.

(3) Licensees seeking approval for reaggregation of licenses must apply by filing FCC Form 601. Each request which involves geographic area aggregation must include an attachment defining the boundaries of the licenses being aggregated by geographic coordinates to the nearest second of latitude and longitude, based upon the 1983 North American Datum (NAD83). The licenses must all be active in the Commission's licensing system, and held by the same licensee under the same FCC Registration Number.

3. Add § 1.961 to read as follows:

**§ 1.961 Enhanced competition incentive program.**

(a) *Definitions*—(1) *Covered small carrier*. A covered small carrier is a carrier (as defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153)) that has not more than 1500 employees (as determined under § 121.106 of title 13, Code of Federal regulations, or any successor thereto) and offers services using the facilities of the carrier.

(2) *Enhanced Competition Incentive Program*. The Enhanced Competition Incentive Program allows licensees to assign or lease some of their spectrum rights pursuant to a given Wireless Radio Service license as part of a qualifying transaction, as defined in paragraph (b) of this section, and in return receive certain benefits, as defined in paragraph (c) of this section.

(3) *Qualifying transaction*. A qualifying transaction under the Enhanced Competition Incentive Program, as defined in paragraph (b) of this section.

(4) *Rural area*. A rural area is any area other than:

(i) A city, town, or incorporated area that has a population of more than 20,000 inhabitants; or

(ii) An urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.

(5) *Tribal Entity.* A Tribal entity is any federally-recognized American Indian Tribe or Alaska Native Village, as well as consortia of federally recognized Tribes and/or Native Villages, or other entities controlled and majority-owned by such Tribes or consortia.

(b) *Eligibility.* (1) In order to qualify for benefits under the Enhanced Competition Incentive Program, a qualifying transaction must partition or disaggregate (pursuant to § 1.950) or lease (pursuant to Subpart X of this part) a minimum of 50% of the frequencies authorized by a Wireless Radio Service license to an unaffiliated entity.

(2) That transaction must also involve either:

(i) An assignee or lessee which is a covered small carrier or Tribal Nation which receives rights to a minimum of 25% of the Wireless Radio Service license area; or

(ii) Any assignee or lessee that proposes to cover at least 300 contiguous square miles of rural area for license areas consisting of a Partial Economic Area or smaller, as defined in § 27.6(a) of this chapter. The transaction may not involve a party which has been previously found to have failed to comply with the requirements of the Enhanced Competition Incentive Program, whether as an assignee or a lessee.

(3) The transaction may not involve any license which has previously been included in a qualifying transaction and received benefits under the Enhanced Competition Incentive Program.

(c) *Incentives.* Parties to a qualifying transaction will be eligible to receive the following benefits.

(1) *License term extension.* The license term for all licenses involved in a qualifying transaction will be extended by five (5) years. If other Commission action, whether by Order or by rule, would otherwise have modified the license term for the party's license, this increase would be in addition to that modification.

(2) *Construction extension.* The period in which each party is required to demonstrate



compliance with the relevant interim and/or final performance requirements of the license will be extended by one (1) year. This will apply to all relevant performance deadlines applicable to this license but will have no impact on any license not covered by the qualifying transaction.

(3) *Alternative construction requirements.* The assignee of a disaggregated or partitioned license in a qualifying transaction under clause (b)(2)(ii) of this section which involves the assignment of, and commitment to cover and serve, a qualifying geography of rural area will substitute the construction requirements which apply to this license with actual coverage over the entirety of the qualifying geography that was the basis for the qualifying transaction, as well as the provision of service to the public, or operation addressing private internal business needs over that area. The assignor of such license remains subject to its original construction requirements, as modified in this section.

(d) *Filing requirements.* Parties seeking to participate in the Enhanced Competition Incentive Program must file for a partition or disaggregation pursuant to § 1.950 or a spectrum lease pursuant to subpart X of our rules. As part of the application, the parties should state whether the transaction qualifies under clause (b)(2)(i) or (ii) of this section, show their satisfaction with all relevant eligibility requirements, and request participation in the program.

(e) Protections against waste, fraud, and abuse.

(1) *Operating requirements.* Licenses assigned through the Enhanced Competition Incentive Program pursuant to paragraph (b)(2) of this section must provide service for a period of at least three (3) years, commencing no later than the next construction deadline for the license (as modified by this program). Lessees of Enhanced Competition Incentive Program transactions must provide service for a period of at least three (3) years during any period within the five (5) years of that lease. The service for licensees and lessees must not fall below the level of service used (or which will be used) to meet its construction requirement or by which it qualifies for participation in the program.

(2) *Holding period.* (i) Licenses assigned through the Enhanced Competition Incentive Program must be held for a period of at least five (5) years following grant of the assignment application. Leases made through the Enhanced Competition Incentive Program must be for a minimum of five years and remain in effect for the entire term of the lease and may not be assigned to another party.

(ii) Licenses assigned through the Enhanced Competition Incentive Program may not be assigned, even after five (5) years following the grant of the assignment application, unless the underlying construction and operating requirements imposed, either through the Enhanced Competition Incentive Program or by other rule, have been satisfied.

(iii) These assignment restrictions do not apply to *pro forma* transfers pursuant to § 1.948(c)(1).

(5) *Automatic termination.* If the licensee of a license assigned pursuant to the Enhanced Competition Incentive Program fails to meet performance requirements, including requirements imposed by this paragraph and those imposed by other Commission rules, that license shall be automatically terminated without further notice to the licensee.